

BONNIE L. GIBSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of Ben H. Walley,
Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi,
for self-insured employer.

Before:

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (89-LHC-218) of Administrative Law Judge Ben H. Walley rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's counsel sought an attorney's fee of \$1,527.25, representing 12 hours at \$125 per hour, and \$27.25 in expenses for work performed before the administrative law judge in connection with claimant's hearing loss claim. The administrative law judge awarded counsel a fee of

\$1,227.25, representing 12 hours at an hourly rate of \$100, plus expenses of \$27.25. Employer appeals the administrative law judge's fee award, incorporating by reference the arguments it made below into its appellate brief. Claimant responds, urging affirmance of the fee award.

Employer initially contends that the administrative law judge erred in holding it liable for claimant's attorney's fees. Employer asserts that there was no successful prosecution of the claim and no additional benefits gained for claimant while the case was before the administrative law judge because it accepted liability for, and voluntarily completed payment of disability compensation on April 20, 1988, prior to referral, in an amount which resulted in an overpayment. Moreover, employer asserts that if any fee is awarded under Section 28(b) of the Act, 33 U.S.C. §928(b), it should be limited to the difference between the amount voluntarily tendered by employer and the amount which claimant ultimately obtained pursuant to the parties compromise agreement.

Under Section 28(a), if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, the claimant is entitled to an attorney's fee award payable by the employer. 33 U.S.C. §928(a). Under Section 28(b), when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that agreed to by the employer. *See, e.g., Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990); *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297 (1984).

In the instant case, employer voluntarily paid claimant permanent partial disability compensation based on a binaural impairment of 20.925 percent. The administrative law judge awarded claimant compensation benefits for a 7 percent whole-man impairment, the equivalent of 20.925 percent binaural impairment, under the American Medical Association *Guides to the Evaluation of Permanent Impairment* 3d ed. (1988) (AMA *Guides*) pursuant to *Ingalls*

Shipbuilding, Inc. v. Director, OWCP, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990).¹ The conversion by the administrative law judge resulted in an overpayment, entitling employer to a credit rendering the next benefit payment to claimant due in 1998. At the hearing employer contested the issue of whether claimant was entitled to an assessment under Section 14(e) of the Act. Moreover, the pre-hearing statement, Form LS-18, dated May 12, 1988, attached to the district director's letter of referral, reflects that employer disputed the issue of medical benefits. Pursuant to the administrative law judge's decision, claimant obtained a Section 14(e) assessment and medical benefits. Employer is thus liable for claimant's attorney's fees for services performed at the administrative law judge level, pursuant to Section 28(b), since claimant's counsel succeeded in obtaining additional benefits for claimant.

Employer objects to counsel's method of billing in minimum increments of one-quarter hour. Consistent with the decisions of the United States Court of Appeals for the Fifth Circuit in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990) (unpublished) and *Ingalls Shipbuilding, Inc. v. Director (OWCP) [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995) (unpublished), we reduce the entry of August 21, 1989, from one-half to one-quarter hour. After considering employer's remaining objections to the number of hours awarded, and to the hourly rate, we reject these contentions, as it has not shown that the administrative law judge abused his discretion in this regard. See *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Employer's remaining contentions, which were not raised below, will not be addressed for

¹In *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), the United States Supreme Court held that claims for hearing loss benefits under the Act must be compensated pursuant to Section 8(c)(13) of the Act. This issue is not before the Board in this case.

the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Accordingly, the Supplemental Decision and Order of the administrative law judge is modified as stated herein, and is otherwise affirmed.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge